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In The

Supreme Court of the United States

OCTOBER TERM 1972

No._____

BRADLEY SISSON BARHAM,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Bradley Sisson Barham respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on September 5, 1972.

OPINION BELOW

The opinion of the Court of Appeals is not yet reported (Appendix p. A-1). The District Court gave no opinion.

JURISDICTION

The jurisdiction of the District Court for the District of Oregon was founded on 18 USC § 3231. The jurisdic-

tion of the Court of Appeals was founded upon 28 USC 1291.

The judgment of the Court of Appeals was entered on July 5, 1972 (Appendix p. A-10). This petition for certiorari will be filed by November 15, 1972. This Court's jurisdiction is invoked under 28 USC § 1254 (1).

QUESTION PRESENTED

Whether evident jury disbelief of a defendant's testimony that he did not know of the counterfeit character of money, is affirmative evidence of the contrary sufficient to uphold a guilty verdict.

STATEMENT OF THE CASE

A jury convicted petitioner of knowingly passing counterfeit money, and he received a sentence of 10 years' imprisonment.

Approximately a month before his arrest on June 30, 1971, petitioner was driving west on Interstate 5 Freeway when he picked up a male hitchhiker described as about five-nine, 135 pounds, dirty-blonde hair, a beard and a wispy mustache. The hitchhiker had an unkempt appearance and appeared to petitioner to be one of the "street people."

While they were en route to a restaurant, in the vicinity of Portland State University, the hitchhiker asked the petitioner if he knew where he could obtain some marijuana and petitioner told him that he thought he could.

Petitioner was in need of money in May of 1971. His girl friend had been paying the rent and he was behind

three months in boat payments. A party owed petitioner approximately $800.00 and could get him "* * * this merchandise * * * in lieu of money."

The hitchhiker and petitioner agreed on the price while they were riding downtown. Petitioner let the hitchhiker off at a restaurant while he obtained the marijuana. Later petitioner returned in his car and the hitchhiker got back into the car. The hitchhiker examined the marijuana and paid Mr. Barham $900 in twenty-dollar bills and left.

Petitioner told officers Bell and Briggs that he was aware he could be arrested, but didn't believe this man was a police officer from his appearance.

Petitioner was certain the counterfeit money came from the hitchhiker because the only other large sum of money he had received since Christmas of 1970 was for the sale of some of his girl friend's antiques for $950.00, but that he already spent the money prior to June 30, 1971.

From early April until petitioner's arrest, Madeline Sue Johnson had been living with petitioner, Brad Barham, at Route 2, Box 221, Newberg, Oregon, under the name of Mrs. Anderson. They were living in a home community under that name in all respects. They received their bills and everything under their assumed name, Anderson.

They signed their lease of the farm on April 13, 1971 under the name of Bradley Anderson and Madeline Anderson. The phone was listed under the name of Brad Anderson. Officer Briggs observed that their mailbox

had the name "Anderson, Route 2, Box 221" on it the day they arrested petitioner.

Madeline Johnson and defendant were living under the name of Anderson so their parents would not know they were living together.

Petitioner, Bradley Barham, is a very placid, well-educated young man with three years of college, who shows no emotion. His father, Burrell Barham, is a retired Bank of America vice president who had sixty branches under him with about 1,500 personnel. Petitioner had served honorably in the United States Marines and has an Honorable Discharge and had never been convicted of a crime.

On the morning of June 29, 1971, petitioner purchased a money order at the Commercial Bank in Newberg, Oregon, from a teller named Elaine Streed in the amount of $250.00, which petitioner admitted. He made the purchase in the presence of Helen Miller, and was not wearing a hat or trying to conceal his identity. At the time, neither Elaine Streed nor petitioner had any idea that any of the bills were counterfeit, and $70.00 of the money was possibly good. Petitioner signed the name he had been living under in the community, Brad Anderson, and placed the address where he was living, Route 2, Box 221, on the money order he had purchased.

Petitioner then went to Bob's Auto to get a vehicle he had in the shop for repairs. The C & G Garage towed the vehicle being repaired in from petitioner's home to Bob's Auto, and petitioner's assumed name and his address were recited on the work order. Petitioner also

gave the garage his telephone number and assumed name. In fact, the service manager contacted petitioner during the two weeks that the vehicle was left there.

The original estimate for vehicle repair had been $250.000 and petitioner had obtained a $250.00 money order so he would have a receipt.

The Government argues that any college student would know a receipt would be forthcoming, but the facts as brought out by the auto repair man show how such receipts are often incomplete. The original receipt was stamped "PAID" and then dated "6-29-71" and initialed "B. E. V." by the service manager, but the duplicate original was stamped "PAID," and at no point did it have a date or the initials of the service manager, because these apparently didn't come through on the carbon copy.

The bill was over $250.00 so petitioner paid an additional $120.00 with six twenty-dollar bills. Petitioner stated under oath that he had no idea the six twenty-dollar bills were counterfeit. Even officer Robert L. Dent couldn't tell for sure if they were counterfeit. Two of the six bills paid Box's Auto had the same serial number.

United States agents Lawrence Briggs and Skalland had no trouble locating petitioner. They simply drove to the mailbox which had the name of "Anderson" at Route 2, Box 221, Newberg, which were the name and address on the work order. Agent Briggs approached petitioner and was greeted by him with the words.

"Can I help you?" Petitioner then told agent Briggs that he lived in the house and when Briggs asked him if he was Brad Anderson, petitioner said "Yes," and in no way tried to infer that he was anybody different from Brad Anderson.

The officers were not armed with a warrant at the time they first met petitioner, and on what happened next there is some disagreement. Petitioner says the agents searched him, and conferred with each other after looking in his wallet just prior to the arrest. Agent Briggs' memory is that he placed petitioner under arrest and then searched his wallet. In any event there is no dispute that Agent Briggs at one time or another asked petitioner for permission to look in his wallet and that petitioner said "Yes." Petitioner was surprised when the agents found counterfeit money in his wallet.

When Agent Briggs looked into the wallet he found "Eighteen counterfeit notes of the same type that were passed in Newberg . . . they were all together, between $162.00 worth of genuine currency. There was a hundred-dollar bill, several tens, and a five and two ones . . ." Agent Briggs then placed petitioner in the car and advised him of his rights.

After petitioner learned that the bills were counterfeit, he saw to it that the Bank and Bob's Auto were paid back.

He voluntarily came in to see Agents Bell and Briggs and told them where and when he thought he had come into possession of the notes, and gave a description of the party who passed the money to him. This statement was

made even though it involved the petitioner in an illegal sale of marijuana.

At no time in the trial was any evidence presented by the Government to show petitioner had the slightest idea that he intentionally possessed or passed counterfeit money.

The history of the passing of the counterfeit notes of the particular issue petitioner had in his possession in the Portland area was presented by Agent Briggs. In 1970, 56 notes, and in 1971, 54 notes, had been passed in the area. Agent Briggs stated that most were passed, usually, just one or two at a time whether at a bank or a store. He didn't recall ever having heard of as many as six being passed at one time, and in most cases there was no history of who had passed the notes. There was nothing in the history to show any of the passers' mode of operation was to put his name and address and phone number on the purchase.

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided an important question of Federal law which reoccurs continuously both in Federal and State Courts in an inconsistent way which has not been, but should be, settled by this Court.

Conviction without evidence of guilt is undoubtedly a Federal Constitutional question. *Thompson v. Louisville*, 362 US 199 (1960); *Johnson v. Florida*, 391 US 596 (1968). This means evidence from which a jury could find a defendant guilty beyond a reasonable doubt. *United States v. Vuitch*, 402 US 62, 72 n 7 (1971).

In this case the question is whether there is any evidence from which the jury could have concluded petitioner knew the money was counterfeit. In this case, as in many, an account by defendant-petitioner as to how he received the money is the only evidence on the subject and the jury verdict hinges on whether jury disbelief of his testimony became affirmative evidence of guilt. It is submitted this is not permissible. Failure of proof is not the equivalent of suppression of evidence, procuring false witnesses or the manufacture of spurious documents. It leaves only a hole in the case; it does not fill the hole with contrary evidence. *People v. Russell*, 266 NY 147, 194 NE 65 (1934); *II Wigmore on Evidence*, 3 ed § 279 p. 126.

In fact different panels of the Ninth Circuit cannot agree on this. *cf. Murray v. United States*, 9 Cir. 403 P2d 694 (1969) with *United States v. Smith*, 9 Cir. 427 F2d 1164 (1970) and the two opinions in the case at bar.

CONCLUSION

For this reason a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

BRADLEY SISSON BARHAM,
Petitioner.

APPENDIX

OPINION OF COURT OF APPEALS

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
vs.	)	No. 72-1402
BRADLEY SISSON BARHAM, also known as BRADLEY ANDERSON, *Defendant-Appellant.*	)	

[September 5, 1972]

On Appeal from the United States District Court for the District of Oregon

Before: JERTBERG, KOELSCH and TRASK, Circuit Judges.

JERTBERG, Circuit Judge:

Appellant appeals from judgments of conviction pronounced upon him following a jury trial on a three-count indictment charging in Counts One and Two that with intent to defraud he passed and uttered forged and counterfeit obligations of the United States, which he then knew to be forged and counterfeited, in violation of Title 18 U.S.C. Sec. 472; and in Count Three that with intent to defraud he possessed and concealed forged and counterfeited obligations of the United States which he then knew to be forged and counterfeited in violation of Title 18 U.S.C. Sec. 472.

He was sentenced to the custody of the Attorney General for a period of ten years on each count, all sentences to run concurrently.

The only issue presented for review, as stated by appellant, is: "Was there evidence that defendant knew the money was counterfeit?"

The essential facts, stated in a manner most favorable to the Government, may be summarized as follows:

On the morning of June 29, 1971, the appellant purchased a money order at the Commercial Bank in Newberg, Oregon, made payable to Bradley Anderson in the amount of $250.00, in exchange for twelve $20.00 bills and one $10.00 bill. The name signed to the application for money order by appellant was Bradley Anderson. Nine of the $20.00 notes were counterfeit.

After leaving the Commercial Bank, appellant paid a $363.00 truck repair bill, incurred by him under the name of Bradley Anderson, with the $250.00 money order and six counterfeit $20.00 notes. Appellant was given a receipt in the name of Bradley Anderson, in the form of a final work order marked "Paid."

On June 30, 1971, appellant was arrested for passing counterfeit notes. An examination of his wallet, voluntarily handed to a Secret Service Agent, revealed eighteen counterfeit $20.00 notes of the same type that were passed to the bank and to the garage. The counterfeit money was all together in the wallet, together with $162.00 worth of genuine currency, consisting of a $100.00 bill, several $10's, and a $5.00 and two $1's.

Of the thirty-three (33) counterfeit notes, including nine (9) passed at the Commercial Bank, six (6) passed at Bob's Auto Company, and eighteen (18) found in the appellant's wallet, seven (7) contained the identical serial number B 07896834 A; seven (7) contained the identical serial number B91618342 A; seven (7) contained the identical serial number B77853003 A; six (6) contained the identical serial number B41838060 A; four

(4) contained the identical serial number B81011259 A; and two of them contained the identical serial number B81128913 A.

On July 14, 1971, appellant appeared with his attorney and gave a voluntary statement to the Secret Service Agents. Appellant said that a month prior to his arrest (about May 31, 1971) he picked up a hitchhiker. En route to Portland, Oregon, the hitchhiker asked appellant if he knew where the hitchhiker could obtain some marijuana. Appellant told the hitchhiker he thought he could get some for him, and they reached an agreement on the price while riding to Portland. The hitchhiker got out of appellant's car at a restaurant; the appellant drove away and later returned with four kilos of marijuana. The hitchhiker was waiting. After briefly examining the marijuana, the hitchhiker took out a roll of twenty-dollar bills. He counted out forty-five (45) notes ($900), gave them to appellant, and departed with a shopping bag full of marijuana.

At the trial appellant testified that he obtained the marijuana from a person who owed him approximately $800. He refused to name him. Appellant described the hitchhiker as about five foot nine, one hundred thirty-five pounds, dirty blonde hair, a beard and a wispy moustache, who had an unkempt appearance and appeared to be "one of the street people."

Appellant stated that he knew nothing about the hitchhiker's background or identity.

He stated he was using the alias "Bradley Anderson" because he was living in common-law marriage with his girl friend and did not want her parents to know.

He stated that he purchased the $250 money order instead of paying cash for the repairs at the garage because he had been cautioned about carrying large sums

of money on his person, and he bought the money order instead of paying the repair bill with cash, so he would have a receipt.

It is conceded by appellant that he possessed and passed the counterfeit currency charged in the indictment. A jury, under instructions which are not questioned by appellant, returned verdicts of guilty thereby impliedly finding beyond a reasonable doubt, as facts, that, with intent to defraud at the time of such possessing and passing, appellant had knowledge that the currency was counterfeit.

In our review the evidence must be taken in the light most favorable to the jury verdict; that it is the exclusive function of the jury to determine the credibility of witnesses; to resolve evidentiary conflicts, and draw reasonable inferences from proven facts. We must assume that the jury resolved all such matters in a manner which would support the verdict. See *United States v. Nelson*, 419 F.2d 1237, 1241 (9th Cir. 1969).

The jury was not bound to accept appellant's testimony that he did not know that the currency was counterfeit. It was not bound to accept, as true, his account of the circumstances of the acquisition of the counterfeit currency which, to say the least, borders upon incredulity. It was not bound to accept his explanation of the use of the alias. All of such circumstances were reasonably susceptible to the drawing, by the jury, of inferences adverse to appellant's contentions.

> "A trier of fact is not compelled to accept and believe the self serving stories of vitally interested defendants. Their evidence may not only be disbelieved, but from the totality of the circumstances, including the manner in which they testify, a contrary conclusion may be drawn." *United States v. Cisneros*, 488 F.2d 298, 305 (9th Cir. 1971).

See also *United States v. Randolph*, 456 F.2d 689 (9th Cir. 1972).

We are satisfied that the evidence before the jury, with reasonable inferences to be drawn therefrom, was sufficient to justify it in finding beyond a reasonable doubt that appellant, with intent to defraud, knew that the currency possessed and passed by him was counterfeit.

The judgment appealed from is AFFIRMED.

DISSENTING OPINION

KOELSCH, Circuit Judge:

I respectfully dissent. Granted, an appellate court reviewing a conviction must view the evidence in a light most favorable to the government. [*Glasser v. United States*, 315 U.S. 60, 80 (1942);] but this record reveals no evidence, substantial or otherwise, tending to prove the conclusion, let alone prove beyond a reasonable doubt, appellant's scienter.

Knowledge can, of course, seldom be proven directly and in the great majority of counterfeiting cases, the prosecution offers circumstantial proof from which the jury can infer the requisite knowledge. See, e.g., *United States v. Bean*, 443 F.2d 17, 18-19 (5th Cir. 1971); *United States v. Knight*, 426 F.2d 818 (4th Cir. 1970); *Ruiz v. United States*, 374 F.2d 619 (5th Cir. 1967). "Of course either direct or circumstantial evidence may fail to prove the fact in issue—direct evidence because the credibility of the witness is destroyed; circumstantial evidence for that reason, or because the inference from the proven circumstances to the fact in issue is too speculative, or remote." *United States v. Nelson*, 419 F.2d 1237, 1240 (9th Cir. 1969). When reviewing evidence for sufficiency the question is "whether the jurors could

reasonably arrive at [their] conclusion. *Id.* at 1243. On this record the question should be answered in the negative.

The government adduced circumstantial evidence on the following matters to prove that appellant possessed the required guilty knowledge—the fact that he negotiated the counterfeit bills under the name Anderson rather than his true name; the manner in which appellant carried the bills in his wallet; and the manner in which the bills were negotiated. While proof of such nature can provide the necessary element of knowledge in a proper case, it is clear that no inferences could have reasonably been drawn from the government's evidence as it appears in this record.

First: Appellant had been known as Anderson in the Newberg, Oregon area, for several month before he passed the bills there. He was not a transient. He had come to Newberg and, together with his "girl friend," had taken up residence under that name. He signed the lease on the premises where they lived under that name. And he had consistently used that name in his business dealings. His transactions with the local bank and garage under that name could not suggest an attempt at deception. It is irrelevant what the jurors may have thought of appellant for living with his girl friend under an assumed name; the significant issue is whether the jurors could infer that he used the name to conceal his identity when passing counterfeit money. On the facts as developed, they could not.

Second, the government emphasized in its closing argument to the jury (and again in its brief on appeal) that when the Secret Service agents searched appellant's wallet, they found that the counterfeit 20-dollar bills were somehow separated from the genuine currency:

"They were segregated so that they were all together in a compartment of the wallet." This assertion simply was not true. The agent who searched the wallet testified only that the counterfeit bills, which were the only 20's in the wallet, were "all together *between* $162 worth of genuine currency. There was a hundred-dollar bill, several tens and a five, and two one's, I believe." (emphasis added). In other words, if the bills were segregated, it was by denomination only. If this is sufficient to suggest an inference of criminal knowledge, then ". . . . men in this country must change their ways of carrying money." *Paz v. United States*, 387 F.2d 428, 431 (5th Cir. 1967).

Third, the government suggests that the appellant's pattern of passing the counterfeit bills suggests an inference that he knew the bills were not genuine. Its theory was that there was no other explanation for appellant's first obtaining a $250 money order at the local bank before he went to the nearby garage to pay a $363 bill. On closing argument, the United States Attorney went so far as to state that appellant purchased the $250 money order, with twelve counterfeit twenties and a genuine ten, to "test" the quality of the bills before attempting to pass any more bills at the garage. This argument assumed, without any evidentiary support, that appellant knew that the amount of the repair bill would be larger than the value of the money order appellant purchased at the bank. In fact, the garage employee who testified for the government stated that the garage had given appellant an estimate for repair work of $250. The need for additional work was discovered later, and none of the government's evidence shows that appellant was made aware that the actual repair bill would exceed the estimate by more than one-hundred dollars. With these facts in mind, appellant's purchase of a money order for $250, rather than for some larger

amount, lends absolutely no support to the government's theory, or to an inference of illegal behavior. Moreover, it seems incredible that appellant, if he wished to test the bills, as the government contends, would attempt to pass twelve of them for that purpose at a single establishment in his home community.

In short, the government took evidence of essentially innocent behavior and magnified it far beyond its probative significance (both by speculation and by outright misrepresentation of the evidence in closing argument) to prove an essential element of the offenses charged. None of the three matters, alone or in combination, as they are developed in this record, provide a sufficient evidentiary foundation for a guilty verdict.

The final matter to be considered is appellant's account of how he came into possession of the counterfeit bills. The government argued that because appellant gave only a vague description of the hitchhiker, because he "refused" to name his source of marijuana which he allegedly sold to the hitchhiker, and because the story was generally incredible, the jury could have rejected it as a fabrication and drawn the contrary inference that appellant knew the money was counterfeit. Again the record does not support the government's position. Both Secret Service agents who interrogated appellant, after his arrest, testified that he did provide them with a physical description of the hitchhiker, and one of the agents specifically disclaimed any suggestion that appellant was evasive or uncooperative when questioned. And, there is no evidence in the record to suggest that appellant refused to identify his marijuana source. Neither Secret Service agent testified that appellant was ever asked about his source, and at the trial the prosecutor so much as foreclosed the issue of the source's identity when he asked appellant: "Now, again, I don't want you

to implicate anybody, but I want you to tell the jury how and under what circumstances you obtained the marijuana."

What remains is the government's assault on the credibility of the story in general. Of course, the jury did not have to believe appellant's story. However, even if the story were disbelieved, I cannot agree that, absent some significant evidence of knowledge, the jury could infer the fact in issue merely because it rejected appellant's story. The burden of proving guilty knowledge is on the government; it is not up to the appellant to disprove it. See *Murray v. United States*, 403 F.2d 694 (9th Cir. 1968). And, as I have attempted to portray above, there was no other sufficiently probative evidence upon which the jury could have reasonably found knowledge. *Compare United States v. Cisernos*, 448 F.2d 298 (9th Cir. 1971).

The conviction should be reversed.

JUDGMENT OF THE COURT OF APPEALS

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
vs.	)	No. 72-1402
BRADLEY SISSON BARHAM, also known as BRADLEY ANDERSON, *Defendant-Appellant.*	)	

APPEAL from the United States District Court for the District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered September 5, 1972.

ORDER OF COURT OF APPEALS DENYING REHEARING

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	)	
vs.	)	No. 72-1402
	)	ORDER
BRADLEY SISSON BARHAM, also known as BRADLEY ANDERSON, *Defendant-Appellant.*	)	

Before: JERTBERG, KOELSCH and TRASK, Circuit Judges.

The panel to which the above case was assigned unanimously determined that the petition for rehearing of appellant should be denied, and appellant's suggestion for a rehearing en banc should be rejected, and on September 29, 1972, pursuant to subsection 4, General Order No. 15 of this Court, the active judges were notified of the action of the panel in respect to said appellant's petition for rehearing.

More than seven days have elapsed since the other members of the Court in active service were advised of the action of the panel, and no member of the panel nor judge in regular active service of the Court having requested that the Court be polled on rehearing en banc [Rule 35, Federal Rules of Appellate Procedure],

NOW, THEREFORE, appellant's petition for rehearing is denied, and his suggestion for rehearing en banc is rejected.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-724

BRADLEY SISSON BARHAM, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Oregon, petitioner was convicted on two counts of having passed and uttered counterfeit currency and one count of having possessed and concealed counterfeit currency, all in violation of 18 U.S.C. 472. He was sentenced to concurrent terms of ten years' imprisonment on each count, subject to the parole eligibility provisions of 18 U.S.C. 4208(a)(2). The court of appeals affirmed, one judge dissenting (Pet. App. A1-A9).

Petitioner contends here, as he did below, that the evidence was insufficient to prove that he knew the money involved was counterfeit. The facts are fully

set forth in the opinions below. We believe the majority below reached the correct result, and we rely principally on its opinion in suggesting that no further review is warranted. We note in addition that, contrary to petitioner's assertion (Pet. 8), the jury was properly permitted to consider his testimony in determining whether he knew the counterfeit nature of the bills he admitted passing. Cf. *McGautha* v. *California,* 402 U.S. 183, 215–216; *United States* v. *Brown,* 456 F. 2d 293, 294, n. 2 (C.A. 2), and cases there cited, certiorari denied, 407 U.S. 910.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JANUARY 1973.

U.S. GOVERNMENT PRINTING OFFICE: 1973